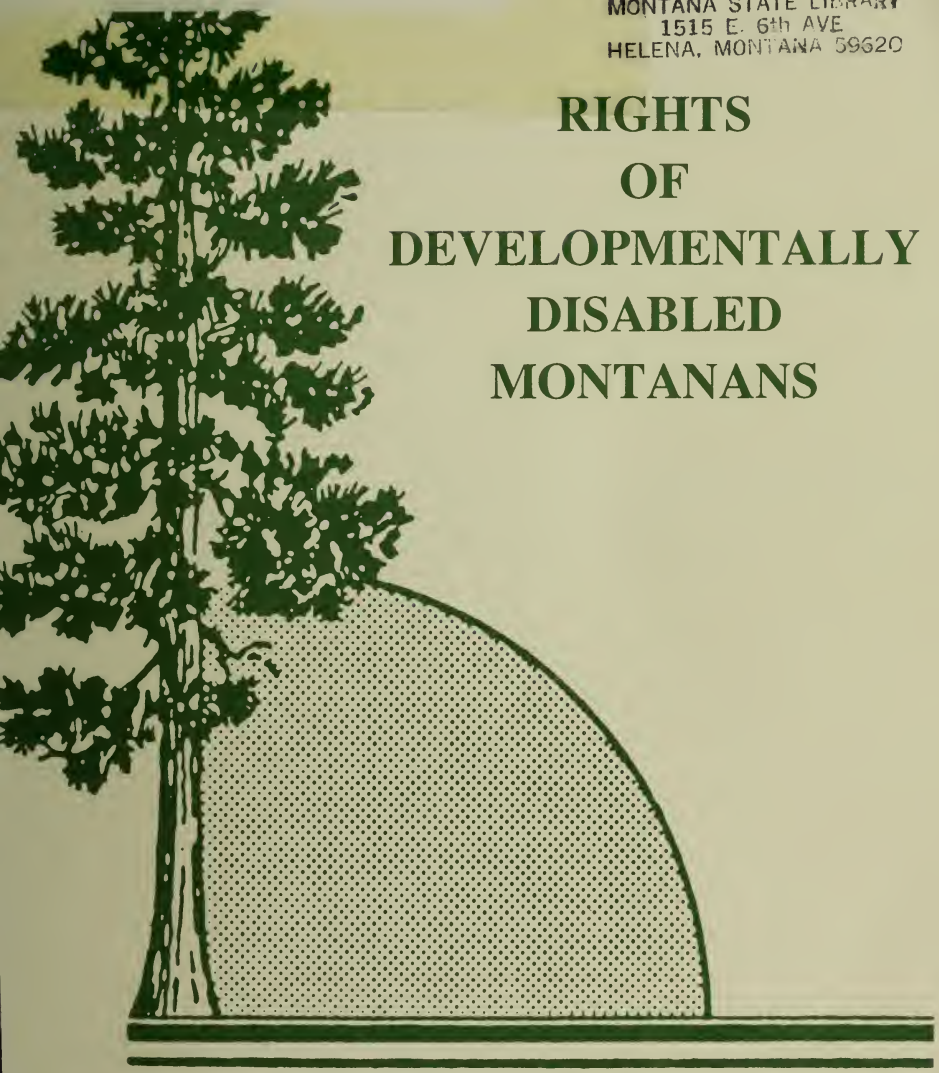

RIGHTS OF DEVELOPMENTALLY DISABLED MONTANANS

JUNE, 1988

4th Edition

RIGHTS OF DEVELOPMENTALLY DISABLED MONTANANS

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MONTANA ADVOCACY PROGRAM, INC.
1410 Eighth Ave.
Helena, MT 59601

June 1988

The Montana Advocacy Program, Inc., is a private, non-profit agency that serves persons with developmental disabilities, persons who have mental illnesses, and vocational rehabilitation clients throughout the State of Montana. Additional copies of this manual and further information about the services offered by MAP can be obtained by contacting this office.

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INTRODUCTION

This manual is intended to provide basic information on a broad range of issues affecting developmentally disabled people in Montana. It is designed and written for use by anyone involved in these issues, including developmentally disabled persons, their parents or guardians, advocates, service providers, attorneys and judges. It is our intention to update this publication periodically.

No manual such as this one can cover all the topics, or answer all the questions that arise regarding the rights of developmentally disabled persons. There are literally volumes of materials on each topic in this manual. Similarly, it may be that the general information in this manual may not directly apply to a specific person's case. Throughout this manual, we have tried to direct readers to the appropriate agencies for resolving any disputes or answering questions. We encourage people to use these resources to insure that the rights of developmentally disabled people in Montana are fully recognized and enforced.

This manual was prepared and distributed by the Montana Advocacy Program, Inc., 1410 Eighth Avenue, Helena, Montana 59601, (406) 444-3889 or 1-800-245-4743. MAP is a non-profit corporation which administers three federally-mandated advocacy programs: the Developmental Disabilities Protection and Advocacy Program (DDP&A), the Client Assistance Program (CAP), and the Mental Health Protection and Advocacy Program (MHP&A). CAP assists persons who are re-entering the workplace through the services of the State's Vocational Rehabilitation Division. MHP&A responds to allegations of neglect and abuse of persons who have been treated for mental illness.

DDP&A, which is responsible for the production of this manual, is designated by the Governor as the developmental disabilities protection and advocacy agency for the State of Montana under federal law P.L. 100-146[1], the Developmental Disabilities Assistance and Bill of Rights Act of 1987. DDP&A's goal is to advocate on behalf of developmentally disabled people in the State of Montana. Any person having any questions about the rights of the developmentally disabled may contact DDP&A for assistance.

Under the mandate of P.L. 100-146, DDP&A is authorized to provide rights-related advocacy services to persons who are disabled according to the following definition:

> The term developmental disability means a severe, chronic disability of a person which —
>
> A) is attributable to a mental or physical impairment or combination of mental and physical impairments;

B) is likely to continue indefinitely;

C) results in substantial functional limitations in three or more of the following areas of major life activity:

i) self care;
ii) receptive and expressive language;
iii) learning;
iv) mobility;
v) self-direction;
vi) capacity for independent living; and
vii) economic self-sufficiency; and

E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.[2]

The authors of this manual are James P. Reynolds and Leslie Taylor, attorneys at law. Editorial assistance was provided by Kristin Bakula, Margaret Ulvestad and Linda Robbins.

[1] 42 USC Sec. 6042.

[2] 42 USC Sec. 6042.

CHAPTER ONE

ACCESSIBILITY

Accessibility is an important issue for handicapped persons seeking to live independently. In recent years, federal and state laws have been enacted to address this problem and to provide full and equal access to public buildings, public accommodations and public transportation.

The Architectural Barriers Act of 1968[1] establishes accessibility standards for federal buildings, monuments, parks, public transportation, and residential and institutional housing. These standards apply to facilities serving developmentally disabled persons.[2] To assure compliance with these standards, the Architectural and Transportation Barriers Compliance Board (ATBCB) was established to investigate and explore ways to address the problem of architectural barriers facing the handicapped. Any individual who believes a federal building is inaccessible to the handicapped may file a written complaint with the ATBCB. The complaint should give the name and address of the complaining party, the location of the facility, and, if known, the funding agency and a brief description of the barriers.[3]

Complaints should be addressed to:

Executive Director
Architecture & Transportation
Barriers Compliance Board
Washington, DC 20202

Additionally, Montana has adopted the Uniform Building Code, which requires that buildings constructed with public funds be accessible to and functional for physically handicapped persons.[4] State law also requires that governmental services be made accessible to handicapped persons.[5]

Expenditures made for the purpose of making business facilities accessible to persons with disabilities are deductible business expenses.[6]

Another form of improving accessibility for physically handicapped persons is the designation of handicapped parking places and special parking

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[1] 42 USC Sec. 4151, **et seq.**

[2] 29 USC Sec. 792, 42 USC Sec. 6022(b) (5) (A) (ii).

[3] 36 CFR Part 1150.

[4] Sec. 50-60-201(4), MCA.

[5] **See,** Chapter 3, Part VI, Discrimination, Governmental Services.

[6] 26 USC Sec. 190.

permits.[7] Application for these parking permits is made to the State Division of Motor Vehicles in Helena or the county treasurer's office in each county.[8] To apply, a person must present a certificate from a licensed physician describing the extent of the disability. There is a $1.00 fee for this permit.[9]

[7] Sec. 49-4-301, **et seq.,** MCA.

[8] Sec. 49-4-303(2), MCA.

[9] Sec. 49-4-303(1), MCA.

CHAPTER TWO

COMMUNITY SERVICES

Developmentally disabled persons are eligible for a wide range of support services in their communities. Some of these services are designed to meet the specific needs of developmentally disabled persons. Other programs are broader in scope, designed to serve all disadvantaged persons. Developmentally disabled persons, as a category of disadvantaged persons, are also eligible for these services.

The purpose of this chapter is to identify the major programs serving developmentally disabled people in the community and to describe how a person may apply for these services.

I. DEVELOPMENTAL DISABILITIES DIVISION (DDD)

The exclusive goal of the Developmental Disabilities Division (DDD) of the State Department of Social and Rehabilitation Services (SRS) is to provide services to developmentally disabled persons. These services include residential services, such as group homes and independent living units; day services, such as employment training, sheltered workshops, and work activity centers; family training and support services, such as parent training and limited relief child care; and transportation services. The stated purpose of the Division is "to provide quality community-based services in the least restrictive environment which promotes the principle of normalization for citizens who are developmentally disabled."[1]

DDD does not provide these services directly; instead it contracts with non-profit organizations across the state to provide these services. DDD is responsible for monitoring its contracts with the local organizations and provides training and assistance to their staff members to assure the services are appropriately delivered. Some examples of local organizations contracting with DDD are Flathead Industries in Kalispell; Westmont in Helena; Milk River Activities Center in Glasgow; Child and Family Services, Inc. in Great Falls; and Eastern Montana Industries in Miles City.

Not all of these programs necessarily provide all of these services. Each service provider's contract determines what services each will provide. In addition, the contract requires each of these local organizations to comply with the rules and policies of the DDD. For example, eligibility determi-

1 Sec. 46.8.101, ARM.

nation and requirements, individualized program development, and client grievance policies all must adhere to DDD guidelines. These rules are found in Title 46, Chapter 8, of the Administrative Rules of Montana.

II. DEPARTMENT OF FAMILY SERVICES (DFS)

While the DDD is the primary agency for serving the developmentally disabled people of Montana, it may be that a developmentally disabled person will have little direct contact with the DDD or its staff. Instead, the person will most often work with group home and day program workers, who are employees of the local non-profit organizations contracting with the DDD; and a social worker, who is employed by the Department of Family Services (although he or she is located in the county office of human services). This social worker may be a very important figure in a disabled person's life and it is important to understand his or her functions.

A. **CASE MANAGEMENT.** To get into the DDD system, a disabled person must first apply for services and be evaluated. Any person suspected of having a developmental disability is eligible for diagnostic and evaluation services.[2] This initial application is made through the county human services (welfare) office.

Once a person is determined to be in need of community based services, his or her case is assigned to a social worker. This social worker then becomes responsible for "managing" this case, that is, the social worker becomes primarily responsible for identifying appropriate services that are needed by the person, for making arrangements to get the person enrolled in the services, and for monitoring the person's progress while receiving the services. This is not to say that the social worker becomes a "dictator" over the person's life. The social worker merely becomes a major source of information and assistance in creating and implementing the individual habilitation plan explained in the next section or in obtaining other necessary services.

B. **INDIVIDUAL HABILITATION PLAN.** Each developmentally disabled person has different abilities and disabilities and, as a result, each needs different services to overcome these disabilities to the extent possible. Some may require only job training while others require more extensive residential and basic skill training services.

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[2] Sec. 46.8.103(1)(a), ARM.

In recognition of this difference, the DDD requires that services for each disabled person be planned and implemented in an individual manner. This is done through the development of an Individual Habilitation Plan (IHP).

The IHP is a written plan of action developed by a team of people who are or will be working with a particular disabled person. It is based on a skill assessment and on the needs of the person.[3] Each person receiving services must generally have an IHP within thirty days after entering a program and the IHP must be reviewed at least every twelve months.[4]

The team which develops this IHP consists of the disabled person, if appropriate; an advocate who represents the client's interest; the person's parents or legal guardians; the case manager (social worker); one person from each service program working with the client; a professional person from the institution where the person lives, if appropriate; special education services representatives; and a staff member of DDD, if possible.[5] Depending on the circumstances, the team may have advisory members, such as other family members, psychologists, physicians, and other consultants.[6]

The IHP developed by the team must include the following elements:

1) the goals for the person;
2) a statement of the person's strengths and disabilities;
3) specific objectives for obtaining the goals and overcoming the person's disabilities, stated in measurable, objective terms;
4) the identities of the persons and agencies responsible for implementing each objective;
5) beginning and completion date for each program;
6) documentation of those needs not being currently addressed; and
7) a statement of the person's medical and dental status.[7]

The individual program coordinator reviews the IHP on a monthly basis.[8] The IHP team works by consensus. All members must agree to the IHP's content and acknowledge their agreement by signing the document.[9] In the event that a consensus cannot be reached, the unresolved issues are to be referred as follows until a decision acceptable to all members of the team is reached:

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[3] Sec. 46.8.105(1), ARM.
[4] Sec. 46.8.105(2), ARM.
[5] Sec. 46.8.105(3), ARM.
[6] Sec. 46.8.105(4), ARM.
[7] Sec. 46.8.105(5), ARM.
[8] Sec. 46.7.105(7), ARM.
[9] Sec. 46.8.105(5)(k), ARM.

a) to the Area DDD manager and the DFS Regional Administrator;

b) to the DDD Administrator and Program and Planning Division Administrator of SRS;

c) to the SRS and DFS directors, whose joint decision is final.[10] If the decision of the department directors is unacceptable to the team, then court review of this decision is possible.[11]

Within this process of developing an IHP, the case manager plays a crucial role. It is his or her responsibility to schedule IHP team meetings, to notify the team members of the meeting time and place, to explain the purpose of the meeting to the disabled person, to record the results of the meeting, to send copies to team members, and to monitor the review process.[12] In providing these services, as with most others, the requirement of confidentiality is of utmost importance. Disabled persons have a right to privacy, a right not to have intimate details of their lives spread around town. For this reason, the case manager is required to emphasize the importance of confidentiality throughout this process and to insure that each team member is aware of and abides by these requirements.[13]

C. **PROTECTIVE SERVICES.** In addition to the foregoing services provided by DFS in coordination with the DDD, DFS also is responsible for providing protective services to developmentally disabled persons.[14] These are services "directed at preventing or remedying neglect, abuse, or exploitation."[15] These services may be provided on a voluntary basis upon the request of any developmentally disabled person or any interested person.[16] Application for such services is made at the county human services office.[17] Examples of the types of protective services available include assistance in obtaining housing, clothing, food, education and training, employment, financial benefits, medical and legal services, protection of property, and financial advice, and in preventing exploitation and abuse.[18] While these services may be similar to those provided by a guardian, DFS

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[10] Sec. 46.8.105(13), ARM. This rule has not yet been amended to recognize the creation of the Department of Family Services. This appeal process may be (and should be) amended in the near future.

[11] Sec. 2-4-701, **et seq.**, MCA.

[12] Sec. 46.8.105(12), ARM.

[13] Sec. 46.8.105(12)(g), ARM.

[14] Title 53, Chap. 20, Part 4, MCA.

[15] Sec. 53-20-401(5), MCA.

[16] Sec. 53-20-403(1), MCA.

[17] Sec. 53-20-403(2), MCA.

[18] Sec. 53-20-405, MCA.

is not a guardian of the person.[19] These services are for assistance to, not control of, the developmentally disabled person.

It is possible for the Department to be appointed the conservator or guardian of a developmentally disabled person in order to provide necessary services to the person.[20] There has to be a court-hearing before such appointment is made.[21]

III. OTHER SERVICES

It is through the IHP process that developmentally disabled persons will receive most of the services they need. As noted at the outset, these services may include residential services, skill training, etc. There are, however, other services for which a developmentally disabled person may qualify, separate from the DDD system.

A. **FINANCIAL ASSISTANCE.** The DDD system does not provide direct financial assistance to persons. For this reason, developmentally disabled persons who seek financial assistance may apply for benefits from the Social Security Administration or the county human services office.

There are two Social Security programs for which a disabled person may qualify: Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI). For further information, see Chapter Eight on Social Security Programs.

Persons receiving SSI from the federal government may be eligible for a supplemental payment from the state to provide for their basic living needs.[22] The payment is intended to serve those SSI recipients who cannot currently live independently and who, therefore, live in one of the following types of facilities:

1) a personal care facility licensed by the Montana Department of Health and Environmental Sciences which provides the required range of services to its residents;

2) a group home licensed by the state to serve developmentally disabled persons;

3) a foster care home licensed by SRS; or

4) a semi-independent program facility approved by SRS.[23]

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[19] Sec. 53-20-405(3), MCA.

[20] Sec. 11.5.203(3), ARM.

[21] Sec. 11.3.205(2), ARM.

[22] Sec. 11.5.401, ARM.

[23] Sec. 11.5.407, ARM.

Persons may apply for state supplemental payments through the county human services office.[24]

Other possible sources of financial assistance available to disabled persons include general assistance (GA), aid to families with dependent children (AFDC), and food stamps. Application for these programs is made at the county human services office.

B. **VOCATIONAL REHABILITATION.** In addition to the training programs operated by DDD, the Vocational Rehabilitation Division of SRS (Voc Rehab or VR) is responsible for providing vocational rehabilitation services to persons with physical or mental disabilities. The services offered, which vary according to the individual's specific vocational needs, include diagnostic services, maintenance, vocational training, placement, transportation and post employment services.[25] The services are designed to prepare disabled persons for gainful employment.

To be eligible for Vocational Rehabilitation Services, a person must be disabled, his or her disability must be a substantial handicap to employment, there must be a reasonable expectation that vocational rehabilitation services may substantially benefit the individual in terms of employability.[26] (The DDD programs impose no such requirement.) SRS will provide all services necessary for assessing eligibility.[27]

If Voc Rehab cannot determine whether services will benefit an applicant after the preliminary assessment, the division may provide the services necessary for an extended evaluation, not to exceed eighteen months, to determine whether vocational rehabilitation services might improve the employability of the applicant.[28]

Once it is established that the applicant is eligible for vocational rehabilitation services, a plan is established which describes the services to be offered to the client.

Individuals may apply for vocational rehabilitation services through their local Vocational Rehabilitation office. Look under SRS/Vocational Rehabilitation in the phone book for the location nearest you.

Confidentiality is protected. Voc Rehab may not disclose any personal information concerning applicants or clients unless the applicant or client agrees to this disclosure in writing.[29]

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[24] Sec. 11.5.402(4), ARM.
[25] Sec. 46.6.501, **et seq.**, ARM.
[26] Sec. 46.6.305, ARM.
[27] Sec. 46.6.304, ARM.
[28] Sec. 46.6.307, ARM.
[29] Sec. 46.6.1101, ARM.

If an applicant or client is displeased with an action or decision of the Vocational Rehabilitation Division, she or he may file a written request for an administrative review of the decision or action. If this decision is not satisfactory to the applicant or client, a fair hearing can be requested. A fair hearing would take place before a hearings officer who will listen to both sides of the case and decide if actions taken were in compliance with Voc Rehab regulations.[30]

Additionally, the Montana Advocacy Program operates the Client Assistance Program (CAP), which is specifically designed to help Voc Rehab clients and applicants receive appropriate services from the Rehabilitation Services Division and Visual Services Division. Any person who feels he or she is not getting the Voc Rehab services to which he is entitled, or is experiencing problems with a Voc Rehab program, should contact CAP through the Montana Advocacy Program.

C. **RESIDENTIAL ALTERNATIVES.** Through its local non-profit contractors, the DDD operates an extensive system of group homes and transitional, and independent living units.[31] A group home is a family-type home with generally eight residents under the supervision of trainers. Transitional living units are apartments where one or two persons live with less supervision than in group homes. There are variations within these basic residential models.

Besides these types of living arrangements, a disabled person needing medical care may also live in a nursing home, either privately or publicly owned. From this residence, a disabled person may participate in day programs operated by the DDD.

Another type of residential placement is a foster home which is a private household licensed by the State to provide care to disabled persons.

A disabled person's residence is one of the matters resolved in the IHP team process. For further information, contact your county human services office or talk with a social worker.

D. **MEDICAL CARE.** Developmentally disabled persons are generally eligible for medical assistance through the Medicaid or Medicare programs.

To be eligible for Medicaid, a person must be eligible for SSI, AFDC, or otherwise have very limited resources. Medicaid is funded by a combination of federal and state money, and is operated by the State. Medicaid covers a variety of medical and health care services for poor and needy

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[30] Sec. 46.6.1201, **et seq.,** ARM.

[31] Sec. 53-20-301, **et seq.,** MCA.

persons. Services must be medically necessary. Because the covered services change from time to time, and the degree of coverage varies, contact a social worker at the county human services office for detailed information about application procedures and coverage.[32]

As with other federal assistance programs, federal law requires that the county human services office may not disclose any private information concerning any applicant or recipient (except for internal administrative purposes) without the written approval of the applicant or recipient.

If a person is denied assistance or services, she or he may request a fair hearing from the Hearings Officer within SRS in Helena. A fair hearing is an informal trial held before an impartial person who will listen to both sides of the case and decide if the actions taken were consistent with the current regulations guiding Medicaid services. The request for a hearing must be made within ninety days of the action about which the complaint is made.[33]

IV. SUMMARY

Because of the broad range of available social services, it is impossible to cover them all. In addition, the creation fo the new Department of Family Services has resulted in the transfer of some services from SRS to the new department. The division of responsibility for some services is not yet completed because of this transfer. Any person interested in learning more about the various programs should inquire at the local county human services office.

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[32] **See, generally,** Title 46, Chapter 12, ARM.

[33] **See, generally,** Title 46, Chapter 2, Subchapter 2, ARM.

CHAPTER THREE

DISCRIMINATION

Developmentally disabled people are full-fledged citizens of the State of Montana and of the United States. Nothing in either the United States Constitution or the Montana Constitution says anything at all like "all persons, except handicapped persons, are citizens," or "handicapped persons are a lesser level of citizens than non-handicapped persons."[1] Both documents grant full citizenship to all persons, regardless of handicap.[2]

As full citizens, developmentally disabled persons are entitled to the same rights, privileges and treatment as are any other persons. This simple statement may seem obvious, yet it is a matter of common knowledge that handicapped persons are routinely denied their rightful place in society, and are routinely placed in an inferior position with respect to the rest of society.

It is in recognition of this commonplace practice that both the state and federal governments have passed laws prohibiting discrimination against handicapped persons. These laws are designed to implement in everyday life the constitutional equality of handicapped persons.

In Montana, there are several laws which deal with discrimination against mentally or physically handicapped persons. The State has declared it to be a basic civil right to be free from discrimination because of physical or mental handicap. This right includes the right to obtain and hold employment and the right to the full enjoyment of any facilities or privileges of any public resort, accommodation, assemblage or amusement.[3]

Beyond these statements of basic personal rights, the State has created the Montana Human Rights Commission, which has the authority to eliminate discrimination against the handicapped in a broad range of areas.[4] The authority of the Commission extends to both private[5] and public[6] agencies.

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[1] In fact, it could be argued that disabled persons enjoy a superior position under Montana's Constitution. Article XII, section 3, requires the state to provide such persons with economic, social, and rehabilitative assistance. **See, Butte Community Union v. Lewis** (1986), Mont., 712 P.2d 1309, 43 St. Rptr. 65.

[2] Amendment XIV, U.S. Const.; Art. II, Sec. 14, Mont. Const.

[3] Sec. 49-1-102, MCA.

[4] Sec. 49-2-101, **et seq.**, MCA.

[5] Sec. 49-2-101 through 601, MCA.

[6] Sec. 49-3-101 through 312, MCA.

On the federal level, Congress has acted to prohibit or eliminate discrimination against the handicapped by federal agencies,[7] in access to public buildings,[8] by federal contractors,[9] and by any program or activity receiving federal financial assistance.[10] The last of these laws is commonly referred to as "Section 504," and, along with its implementing regulations,[11] it is a most powerful tool with which to obtain equal treatment of handicapped persons because of the wide involvement of the federal government in many public and private activities.

Together, these state and federal laws prohibit discrimination in the following areas.

I. EMPLOYMENT

In Montana, it is a prohibited discriminatory practice for a state or private entity to do any of the following because of a person's mental or physical handicap:

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[7] 29 USC Sec. 791.

[8] 29 USC Sec. 792.

[9] 29 USC Sec. 793.

[10] 29 USC Sec. 794.

[11] ACTION, 45 CFR Part 1232.
Agency for International Development, 22 CFR Part 217.
Dept. of Agriculture, 7 CFR Part 15b.
Dept. of Commerce, 15 CFR Part 8b.
Dept. of Defense, 32 CFR Part 56.
Dept. of Education, 34 CFR Part 104.
Dept. of Energy, 10 CFR Part 1040.
Dept. of Health and Human Services, 45 CFR Part 84.
Dept. of Justice, 28 CFR Part 41.
Dept. of Labor, 29 CFR Part 32.
Dept. of State, 22 CFR Part 142.
Dept. of Interior, 43 CFR Part 17, Subpart B.
Dept. of Transportation, 49 CFR Part 27.
Environmental Protection Agency, 40 CFR Part 7, Subpart C.
Federal Election Commission, 11 CFR Part 6.
NASA, 14 CFR Part 1251.
National Endowment for the Arts, 45 CFR Part 1151.
National Endowment for the Humanities, 45 CFR Part 1170.
National Science Foundation, 45 CFR Part 605.
Nuclear Regulatory Commission, 10 CFR Part 4, Subparts B and E.
Small Business Administration, 13 CFR Part 113.
Tennessee Valley Authority, 18 CFR Part 1307.
Veterans Administration, 38 CFR Part 18, Subpart D.

A. For an employer to refuse employment or to discriminate in compensation, terms, conditions or privileges of employment;[12]

B. For a labor organizatin to exclude or expel from its membership or apprentice training programs, or to otherwise discriminate against, a handicapped member or applicant;[13]

C. For an employer or employment agency to advertise or use an application form indicating, directly or indirectly, any discrimination;[14] or

D. For an employment agency to refuse to refer for employment, to classify according to disability, or to otherwise discriminate.[15]

Federal agencies are similarly prohibited from discriminating against handicapped persons in their employment practices.[16]

There is one crucial exception which must be kept in mind in considering claims of handicap discrimination in employment: the ''bona fide occupational qualification,'' or ''bfoq,'' for short. Both state and federal

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[12] Sec. 49-2-303(1)(a), 49-3-201, MCA.

[13] Sec. 49-2-303(1)(b), MCA.

[14] Sec. 49-2-303(1)(c), 49-3-202, MCA.

[15] Sec. 49-2-303(1)(d), 49-3-202, MCA.

[16] Prohibiting handicap discrimination in employment by federal agencies:
ACTION, 45 CFR Part 1232, Subpart B.
Agency for International Development, 22 CFR Part 217, Subpart B.
Dept. of Agriculture, 7 CFR Sec. 15.b11, **et seq.**
Dept. of Commerce, 15 CFR Part 8b, Subpart B.
Dept. of Defense, 32 CFR Sec. 56.8(b).
Dept. of Education, 34 CFR Part 104, Subpart B.
Dept. of Energy, 10 CFR Sec. 1040.66, **et seq.**
Dept. of Health and Human Services, 45 CFR Part 84, Subpart B.
Dept. of Justice, 28 CFR Sec. 41.42, **et seq.**
Dept. of Labor, 29 CFR Part 32, Subpart B.
Dept. of State, 22 CFR Part 142, Subpart B.
Dept. of Interior, 43 CFR Sec. 17.210, **et seq.**
Dept. of Transportation, 49 CFR Part 27, Subpart B.
Environmental Protection Agency, 40 CFR Sec. 7.60.
Federal Election Commission, 11 CFR Sec. 6.140
NASA, 14 CFR Subpart 1251.2.
National Endowment for the Arts, 45 CFR Sec. 1151.31, **et seq.**
National Endowment for the Humanities, 45 CFR Part 1170, Subpart C.
National Science Foundation, 45 CFR Part 604, Subpart B.
Nuclear Regulatory Commission, 10 CFR Sec. 4.540.
Small Business Administration, 13 CFR Sec. 113.3.
Tennessee Valley Authority, 18 CFR Sec. 1307.5.
Veterans Administration, 38 CFR Sec. 18.411, **et seq.**

laws allow discrimination against mentally or physically handicapped persons if the reasonable demands of the job require such a discrimination.[17]

The extent to which a particular job demand constitutes a ''bfoq'' justifying discrimination depends on several factors, such as the degree and kind of handicap and the nature of the position. Such exemptions are not to be freely given.[18] In fact, employers and others are under an affirmative obligation to make reasonable accommodations or adjustments in the job so as to permit the hiring of a qualified handicapped applicant.[19] Whether a particular accommodation is reasonable again depends on several factors, such as the accommodation and the size and type of the employer's operation.[20]

II. PUBLIC ACCOMMODATIONS

Montana law prohibits the owner or operator of any public accommodation from refusing any of its services to handicapped persons, or from advertising that such services will be refused to a handicapped person.[21] For purposes of this law, ''public accommodation'' is defined as virtually any type of business or establishment which offers its services to the general public.[22]

To the extent the business or establishment contracts with or receives funds from the federal government, it is under a similar federal prohibition barring discrimination against the handicapped.[23]

III. HOUSING

Except for sleeping rooms rented out in single family houses,[24] it is unlawful to discriminate against a handicapped person in the sale or rental of housing; to discriminate in any term or privilege relating to the use, sale or rental of housing; to inquire of any physical or mental handicap; or to advertise indicating that such discrimination will be done.[25]

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[17] Sec. 49-2-303(1), 49-3-103, MCA: **see,** Federal regulations cited in Footnote 16.

[18] Sec. 49-2-401, MCA.

[19] Sec. 24.9.1404, 24.9.1405, ARM; **see,** Federal regulations cited in Footnote 12.

[20] **See,** Federal regulations cited in Footnote 16.

[21] Sec. 49-2-304, MCA.

[22] Sec. 49-2-101(17), MCA.

[23] 29 USC Sec. 794.

[24] Sec. 49-2-305(2), MCA.

[25] Sec. 49-2-305, MCA.

There is extensive federal involvement in housing, through such agencies as the Federal Housing Administration, the Farmers Home Administration, and the Veteran's Administration. Where these agencies are involved, the federal laws prohibiting discrimination against the handicapped also apply.[26]

IV. FINANCING AND CREDIT

Neither financial institutions nor creditors may discriminate against physically or mentally handicapped persons in the extension of credit or financial services.[27]

V. EDUCATION

Both state and federal laws prohibit discrimination against the handicapped in the provision of educational services.[28] In fact, both levels of government have assumed the obligation of insuring that handicapped students receive an education appropriate to their needs and abilities. For more information, see Chapter Nine on Special Education.

VI. GOVERNMENTAL SERVICES

It has already been noted that the federal government prohibits discrimination against the handicapped by federal agencies in the provision of governmental services.[29] Montana law also prohibits such discrimination by state agencies in the provision of state governmental services.[30] This prohibition extends to all political subdivisions of the state, including school districts.[31] Clearly, governments which require discrimination-free conduct of private parties may do no less themselves. Thus, all services, facilities, or benefits of the federal and state governments must be available to all, regardless of handicap.

A related matter involving government services is the requirement that the handicapped person be physically able to get the services. For this reason, the federal government now requires that all new buildings, in

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[26] 29 USC Sec. 794.

[27] Sec. 49-2-306, MCA.

[28] Sec. 49-2-307, 49-3-203, MCA; 34 CFR Sec. 104.31 through 104.47.

[29] 29 USC Sec. 794.

[30] **See, generally,** Sec. 49-3-101, **et seq.,** 49-2-308, 49-3-205, MCA.

[31] Sec. 49-3-101(5), 49-3-102, MCA.

which federal funds are used, be designed and constructed so as to afford access to handicapped persons,[32] and that, to the extent possible, all existing buildings be made accessible.[33] In any event, it is unlawful to deny services to a handicapped person just because an agency's facilities are inaccessible.[34] The agency must devise means whereby the handicapped person may receive the services.

VII. ENFORCEMENT

Both federal and state governments have passed specific laws to eliminate discrimination against handicapped people. It some areas, such as reasonable accommodations in employment, the laws go beyond merely requiring equal treatment of handicapped citizens to require that artificial or minor barriers to their full participation in society be removed.

Yet all the laws in the world will not eliminate discrimination if those laws are not enforced. Therefore, if you believe you have been the victim of discrimination, contact either a lawyer or:

The Montana Human Rights Commission
1236 Sixth Avenue
Helena, Montana 59601

They will tell you what to do. **Don't delay.** The Human Rights Commission must receive your complaint within 180 days after the alleged discrimination occurs, or you discover it.[35] If you delay past this time, you will not be able to have the Commission hear your case.

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[32] 29 USC Sec. 792.

[33] 29 USC Sec. 792.

[34] **See,** Federal regulations cited in Footnote 11.

[35] Sec. 49-2-501, 49-3-304, MCA. In some cases, in claims of discrimination by the government, where a grievance procedure exists, this time may be extended to 300 days. Sec. 49-3-304, MCA. To be safe, however, get in touch with the Human Rights Commission immediately after the discrimination occurs.

CHAPTER FOUR

EMPLOYMENT PREFERENCE

In 1983, the Montana Supreme Court held that a veteran or handicapped person who was qualified for a position within a state or local government agency had to be hired for the position even though there were other better qualified applicants.[1] This decision, based on laws passed in the 1920's, caused quite a controversy and disrupted hiring by many governmental agencies.

In response to this controversy, the Montana Legislature met in December, 1983, and passed a new Veterans' and Handicapped Persons' Employment Preference Act.[2] Although this Act repealed the absolute preference granted under the **Crabtree** decision, it does retain a governmental employment preference for Montana's handicapped.

Under this new Act, a handicapped person who is substantially equally qualified for a position must be hired over a person not eligible for the preference.[3] There are certain limitations on this preference. For example, this preference applies only to initial hirings, not to promotions or transfers within a governmental agency.[4] Not all governmental agencies or positions must apply the preference; most notably, school districts and the university system are excluded.[5]

The Act also sets up specific time limits in which to bring a lawsuit to enforce a preference. The applicant must file his or her lawsuit within 90 days of receiving notice of the hiring decision.[6] If the applicant wins the lawsuit, it does not mean he or she gets the job; the public employer only has to re-open the selection process.[7]

A handicapped person is eligible for this preference as long as his or her disabling condition exists.[8] The spouse of a 100% disabled handicapped person is also eligible for this preference.[9]

If you feel you have been denied a preference in employment to which you are entitled, you should contact an attorney immediately because of the relatively short time periods in which certain actions must be taken.

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[1] **Crabtree v. Montana State Library** (1983), Mont., 665 P.2d 231.
[2] Sec. 39-30-101, **et seq.**, MCA.
[3] Sec. 39-30-201, MCA.
[4] Sec. 39-30-201(2), 39-30-103(5)(b), MCA.
[5] Sec. 39-30-103(8), MCA.
[6] Sec. 39-30-207(2), MCA.
[7] Sec. 39-30-207(3)(c), MCA.
[8] Sec. 39-30-203(1), MCA.
[9] Sec. 39-30-103(3), 39-30-203(1), MCA.

CHAPTER FIVE

GUARDIANS AND CONSERVATORS

Guardianship is a legally-created relationship between a competent adult (the guardian) and a minor child or incapacitated adult (the ward). This relationship gives the guardian the legal right and the legal responsibility to act on behalf of the ward in making decisions concerning his or her life or property. While parents are the legal guardians of their own **minor** children without court intervention, court approval is necessary to create guardianship in all other situations. This chapter will discuss the legal requirements for guardianships.

I. GUARDIANS OF MINORS

A. APPOINTMENT

There are two ways to appoint a guardian for a minor:

1) a district court may appoint the guardian for any unmarried minor if the minor's parents' rights have been terminated or suspended by court order or circumstances,[1] or

2) a parent may appoint the guardian through his or her written will.[2]

Where there has been no appointment by will, and an unmarried minor child is in need of a guardian to supervise his or her well-being, the court may appoint a guardian for the minor where such an appointment would be in the best interests of the minor.

B. POWERS AND DUTIES

A guardian of a minor has the same powers and duties as a parent, except that the guardian is not legally obligated to support the ward with his or her own funds and cannot be held personally liable to third parties for acts of the ward, as a parent might be.[3]

C. TERMINATION AND REMOVAL

A guardian's authority terminates upon the guardian's death, resignation, or court removal, or upon the minor's death, adoption or marriage, or upon the ward's reaching eighteen years of age (the age of majority).[4] If the ward requires further guardianship because of some incapacity,

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[1] Sec. 72-5-222, MCA.
[2] Sec. 72-5-211, MCA.
[3] Sec. 72-5-231, MCA.
[4] Sec. 72-5-233, MCA.

it is necessary to proceed with a new guardianship action seeking either limited or full guardianship pursuant to the procedures established for guardianship of incapacitated persons.[5]

Any person interested in the ward's welfare, including the ward if 14 years of age or more, may petition the court to remove a guardian if such removal would be in the best interest of the ward. After notice and hearing, the court may terminate the guardianship and make such further orders as may be necessary.[6]

II. GUARDIANS OF INCAPACITATED PERSONS

In some circumstances, it may be appropriate for an incapacitated person to have a guardian appointed to assist him or her in dealing with certain living needs. An incapacitated person is someone who, due to his or her disability, is unable to make responsible decisions.[7]

Guardianships for incapacitated persons may be ordered only to the extent the persons' actual mental and physical limitations demand. The guardianship must be designed to encourage the development of maximum independence of the ward and may be used only as necessary to promote and protect the well-being of the incapacitated person.[8]

Any incapacitated person for whom a guardian has been appointed retains all legal and civil rights except those that have been expressly limited or specifically granted to the guardian by the court.[9]

A. APPOINTMENT

1. **Appointment by Will.** The parents of an incapacitated person may appoint a guardian for him or her in their written will, if they have obtained legal guardianship of the person. The spouse of an incapacitated person who has obtained legal guardianship may likewise appoint a guardian by written will.[10]

Before a guardianship by will can take effect, the alleged incapacitated person must be given seven days written notice of his or her right to object to the guardianship. If he or she does not object, the guardianship takes effect according to the terms of the will. If the alleged incapacitated

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[5] **In re Guardianship of Evans** (1978), 197 Mont. 438, 587 P.2d 372.

[6] Sec. 72-5-234, MCA.

[7] Sec. 72-5-101(1), MCA.

[8] Sec. 72-5-306, MCA.

[9] Sec. 72-5-306, MCA.

[10] Sec. 72-5-302, MCA.

person does object, she or he must file a written objection with the court where the will is being probated. Where there is an objection, the appointment is not made until the procedures for appointment by the district court outlined below are followed.

2. **Appointment by District Court.** An incapacitated person or any person interested in his or her welfare, including the county attorney, may petition the court to appoint a guardian.[11] If the court is satisfied that the person for whom a guardianship is sought is, in fact, incapacitated and that a guardian is necessary to oversee some or all of the activities of that person, the court may appoint a full or limited guardian.[12]

Any competent person or qualified institution, association or non-profit corporation, or any of its members may be appointed as guardian.[13] A court cannot, however, appoint a service provider, a creditor, or someone having a conflict of interest as guardian.[14]

The court may appoint the State as guardian if there is no other qualified person willing and able to serve as guardian.[15] To become a court-appointed guardian, it is necessary to follow the procedures required by the Montana statutes.

a. **Filing of a Petition.** Any person interested in the welfare of a person alleged to be incapacitated may file a formal written petition for guardianship with the District Court. The petition must indicate whether a full or limited guardianship is being sought and should specify the powers and duties of the guardian.[16]

b. **Appointment of a Physician and Visitor.** The court will appoint a physician to examine the person alleged to be incapacitated and to submit a written report to the court regarding the nature and severity of the person's alleged incapacity.[17]

The court will also appoint a "visitor." Whenever possible, the visitor should be a trained professional in a field related to the kind of disabling condition alleged to be the cause of the incapacity. The visitor conducts interviews with the person alleged to be incapacitated, the person who petitioned the court, and the person nominated to act as guardian.[18]

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[11] Sec. 72-5-315(1), MCA.

[12] Sec. 72-5-316, MCA.

[13] Sec. 72-5-312(1), MCA.

[14] Sec. 72-5-312(4), MCA.

[15] Sec. 72-5-312(5), MCA.

[16] Sec. 72-5-319, MCA.

[17] Sec. 72-5-315(3), MCA.

[18] Sec. 72-5-313, 72-5-315(3), MCA.

The purpose of the visitor is to provide the court with an objective third party view of the situation. The visitor reports on the need for a guardian, the wishes of the alleged incapacitated person and the appropriateness of the suggested living arrangements. By the use of the visitor, it is hoped that unnecessary or overly restrictive guardianships will be avoided and maximum protection of the rights of the incapacitated person will be promoted.

c. **Notice.** Upon the filing of a petition with the court, the court will set a date for a hearing. Notice of the hearing must be provided to:

(1) the person alleged to be incapacitated.

(2) the spouse, parents and adult children of the alleged incapacitated person, or, if she or he has no spouse, adult children or living parents, at least one of his or her closest relatives.

(3) any person serving as guardian, conservator or custodian of the incapacitated person.[19]

d. **Rights of the Person Alleged to be Incapacitated.** The person alleged to be incapacitated is entitled to notice of the proceedings and is entitled to attend any hearing in person. The person may be represented by counsel and may ask the court to appoint a lawyer to represent him or her. She or he may present evidence and cross examine witnesses. She or he has the right to have a jury trial or may request a closed hearing without a jury.[20]

e. **The Hearing.** The purpose of the hearing is to present evidence to the judge or jury regarding the issue of whether the person is incapacitated. The court must determine the extent to which the incapacity impairs the person; what powers and duties should be granted to the guardian, if any, and which rights and responsibilities can reasonably be exercised by the incapacitated person.

The court may not grant a guardian powers or duties greater than those requested in the petition and may create a limited guardianship or conservatorship rather than a full guardianship if the evidence suggests it is appropriate to do so. The court may dismiss the petition and not appoint a guardian if a guardian is not needed.[21]

B. POWERS AND DUTIES

There are three forms of guardianship for incapacitated persons: full, limited, and temporary. Regardless of the method of appointment, the

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[19] Sec. 72-5-314, MCA.

[20] Sec. 72-5-315(4), MCA.

[21] Sec. 72-5-316, MCA.

powers and duties of the guardian depend to a large extent on the form of guardianship.

1. **Full Guardianship.** Full guardianship is a guardianship in which the guardian is granted the same powers, rights and duties respecting the ward that a parent has respecting his or her unemancipated minor child. However, no guardian may involuntarily commit a ward for observation, evaluation or treatment for mental illness or developmental disability except as provided by the involuntary commitment statutes.[22]

Full guardianships are used only when the person is incapable of making any decisions on his or her own behalf. Montana law discourages full guardianships except when absolutely necessary.

2. **Limited Guardianship.** Limited guardians possess only those powers and duties specified by the court's order appointing them.

The purposes for which a limited guardian may be appointed include:

a) to care for and maintain the ward.

b) to assert and protect the rights and best interest of the ward.

c) to provide informed consent to necessary medical procedures implemented in connection with habilitation and training programs.

d) to assist in the acquisition of necessary training, habilitation and education for the ward.

e) to exercise any other powers, duties or limitations as may be specifically outlined in the court order.[23]

3. **Temporary Guardianship.** If an incapacitated person has no guardian and an immediate emergency presents itself, the court may exercise the powers of a guardian pending notice and hearing or may appoint a temporary guardian without notice and hearing if necessary.[24] This situation may arise when the incapacitated person requires immediate medical care but lacks the capacity to provide the informed consent required by most hospitals and physicians. Also, a temporary guardian may be appointed if an appointed guardian is not properly performing his or her duties.[25]

The temporary guardian has only those powers specified in the court order appointing him or her. In no case does a temporary guardianship last longer than six months.[26]

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[22] Sec. 72-5-321, MCA.

[23] Sec. 72-5-320, MCA.

[24] Sec. 72-5-317, MCA.

[25] Sec. 72-5-317(2), MCA.

[26] Sec. 72-5-317(3), MCA.

C. MODIFICATION

Once obtained, the extent of the guardianship may be modified if the ward acquires more skills to enable him or her to take on more responsibilities or requires more protection. To change a full guardianship to a limited guardianship or vice versa, a new petition must be filed with the court and the procedural steps set forth above must be followed.

D. TERMINATION AND REMOVAL.

There are several ways for a guardianship to end:

1. the ward dies;
2. the guardian dies;
3. the guardian becomes incapacitated;
4. the guardian resigns;
5. the guardian is removed by the court for failing to do a good job (Anyone who is interested in the ward's well-being can bring this fact to the court's attention.);
6. the ward becomes capable of dealing with his or her own affairs. The ward, or someone acting on his or her behalf, may file a formal legal document or may write to the judge stating why they believe this to be so. The judge may hold a hearing and may appoint a visitor to investigate the situation. The hearing must be held according to the procedures set forth above.[27]

In any case in which the guardian dies, resigns, or is removed, a new guardian may be appointed for the ward if necessary. The new appointment must follow the procedures set forth above.

III. CONSERVATORSHIPS AND PROTECTIVE ORDERS

When a minor or incapacitated person has property or affairs which require management and because of minority or other disability the person cannot effectively manage his or her property, the court may appoint a conservator for the estate of the minor or incapacitated person.[28]

A conservator's authority is limited to the management of the property and financial affairs of the ward's estate. The responsibility for the care of the ward's personal needs rests with the guardian.

Where the ward has no valuable property or affairs which require special management, the guardian may handle the financial and business affairs of his ward without being appointed as conservator by the court.[29]

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[27] Sec. 72-5-324 through 325, MCA.

[28] Sec. 72-5-409, MCA.

[29] Sec. 72-5-321(2)(d), MCA.

However, when there is a sizeable estate or business affairs which require protection or management, it is wise to have a conservator appointed. Any person who is interested in the estate, affairs or welfare of a minor or incapacitated person may petition for the appointment of a conservator or for a protective order regarding some aspect of the ward's estate.[30]

Where full-time management of the estate may not be necessary, the court may enter protective orders which would authorize or approve any specific transaction relating to the property and affairs of the protected person.[31]

The procedures for appointing a conservator or obtaining protective orders are similar to the procedures for appointment of a guardian and are initiated by the filing of a written petition with the district court.[32]

The conservatorship may be terminated or the conservator removed and replaced by the court upon the filing of a petition and after notice and hearing.[33]

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[30] Sec. 72-5-401, MCA.

[31] Sec. 72-5-422, MCA.

[32] **See,** Sec. 72-5-401, **et seq.,** MCA.

[33] Sec. 72-5-437, MCA.

CHAPTER SIX

INDIVIDUAL RIGHTS

Developmentally disabled persons generally have the same rights as other citizens of Montana. This chapter is intended to discuss certain of these rights as they relate to developmentally disabled persons. It is by no means an exhaustive discussion.

I. CONFIDENTIALITY

Montana's Constitution is one of the few state constitutions containing an express provision guaranteeing the right to privacy.[1] This protection covers all persons in Montana, including developmentally disabled persons.

Because of the extensive involvement of various state and private agencies in the lives of many developmentally disabled persons, it is important that this right of privacy be fully recognized and protected. Without this protection, the intimate details of the lives of these people could become common knowledge in their communities. In recognition of this right to privacy, the various programs which are described in this manual have express requirements that no one involved in the care, treatment, and habilitation of a developmentally disabled person may reveal details about the person without the person's written consent. This prohibition applies to parents, advocates, social workers, group home staff, and anyone else having anything to do with a developmentally disabled person.

II. CONTRACT RIGHTS

It is the general rule that all persons are capable of entering into contracts, with the exception of minors and persons of "unsound mind."[2] There is, however, no definition of what constitutes an "unsound mind." Montana's statutes provide that person's "entirely without understanding" have no power to make a contract.[3] Thus it is reasonable to assume that a person who is not "entirely without understanding" may enter into contracts.

Montana statutes further suggest that if a person has been determined to be incapacitated by a court and a full guardian has been appointed, this person lacks the capacity to enter into a contract.[4]

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[1] Art. II, Sec. 10, Mont. Const.

[2] Sec. 28-2-201, MCA.

[3] Sec. 28-2-202, MCA.

[4] Sec. 28-2-202, 28-2-203, MCA.

The Montana Human Rights Act states that it is unlawful to deny a person employment public accommodation or financial credit on the basis of a mental handicap,[5] unless the denial is based upon reasonable grounds.

Thus it is clear that developmentally disabled individuals have the right to enter into contracts regarding employment public accommodation, housing or credit unless they are "entirely without understanding" or they have been declared incapacitated to enter into contracts through a guardianship proceeding.

A contract made by a person lacking the capacity to enter into a contract may be cancelled upon a proper showing that they do in fact lack the capacity to enter a contract.[6] This can be done either through direct negotiation with the creditor or through a court proceeding. A contract for the purchase of necessities, however, cannot be cancelled.[7]

III. MARITAL AND FAMILY RIGHTS

The United States Supreme Court has recognized the right to marry as part of the "liberty" guaranteed by the Fourteenth Amendment to the United States Constitution[8] and the right to have children has likewise been recognized as a fundamental constitutional right.[9] As fundamental rights protected by the Constitution, these rights may not be restricted by the State unless there is a compelling State interest which justifies such restriction.

No law in Montana prohibits a developmentally disabled person from marrying[10] nor is there any law restricting the right to have and raise a family.[11]

IV. STERILIZATION

Of all the issues considered in this handbook, the issue of sterilization of developmentally disabled persons is perhaps the most controversial and unsettled. This issue presents a thorny question for advocates, relatives

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[5] Sec. 49-2-303 through 306, MCA.

[6] Sec. 28-2-203, MCA.

[7] Sec. 28-2-204, MCA.

[8] **Loving v. Virginia** (1967), 288 U.S. 1.

[9] **Skinner v. Oklahoma** (1952), 316 U.S. 535.

[10] Section 40-1-402(1)(a), MCA, provides, however, that a marriage may be invalidated if it is shown that one party lacked the capacity to consent at the time of the marriage by reason of mental incapacity.

[11] **See, Matter of J.L.B.** (1979), 182 Mont. 100, 594, R2d, 1127.

and developmentally disabled persons themselves. This section will attempt to address and discuss the issues raised and will present the current state of law on this question.

The United States Supreme Court has interpreted the United States Constitution to include a fundamental right of privacy for all people. Included within this right of privacy is the right to sexual expression, the right to procreate and raise children; also included is the right to choose not to procreate and bear children. Both aspects of this fundamental right of privacy come into play in any situation in which the issue of sterilization is raised.

Sterilization of developmentally disabled persons was previously governed by the various eugenic statutes which existed in every state. These notorious statutes often mandated the involuntary sterilization of institutionalized developmentally disabled persons and were designed for the misguided purpose of eliminating mental disabilities from the population. As the rights of developmentally disabled people developed and more recent studies showed the futility of the social engineering purpose of eugenic statutes, Montana and most other states repealed these eugenic laws.

It is against this historical background that the sterilization issue is presented. Because all people are covered by the constitutional protection of one's right to privacy which includes the right to procreate, it is generally understood that the privacy rights of developmentally disabled persons must be protected when considering the advisability of sterilization.

While it may be in the person's best interest to seek a sterilization and while the right to privacy includes the right of access to sterilization, the legal problem raised in these "voluntary" sterilization cases results from the fact that because of the person's perceived inability to consent to surgery, it is never clear whether elective sterilization of developmentally disabled persons may be termed voluntary or involuntary.[12] Therefore, physicians and hospitals often refuse to perform sterilization on developmentally disabled persons without a court order because of their potential liability should it be established later that the incompetent person was involuntarily coerced into the operation.[13] Because of this trend, a growing number of state courts are being presented with petitions by parents and guardians seeking the sterilization of their incompetent children or wards.

Judges considering this issue are faced with the threshold question of whether the court has the power and authority to order or consent to the sterilization of a developmentally disabled person. Across the nation, the courts which have considered the issue have split as to whether they have

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[12] Note, 34 Rutgers L. Rev. 567 (1982).

[13] **See,** Comment, 57 Wash. U.L.Q. 1977 (1982).

the authority to order such sterilizations. Several courts have taken the position that, in the absence of a specific statute creating that authority, the court has no power to authorize sterilizations.[14] Other courts have ruled they do have the power to authorize sterilizations if it is shown that the sterilization is in the best interest of the incompetent person.[15]

Because Montana has no statute concerning sterilizations of developmentally disabled persons and because neither the United States nor the Montana Supreme Court has ruled on this issue, it is not clear how a Montana court would decide such a case. Any state district court presented with a petition for authorization of sterilization of a developmentally disabled person must first decide whether it has the power to authorize sterilization and, if it determines it has the power, whether sterilization is in the best interests of the person before the court.

To provide adequate protection of the fundamental right to privacy, some courts have established a stringent set of standards which must be met before authorizing a sterilization.[16] Although the standards established by these courts are not binding on the Montana Courts, they do provide guidance for protecting the privacy rights of the developmentally disabled person involved and provide a basis from which any court can reach an appropriate decision.

In summary, the standards prescribed by these cases require that:

1. The incompetent person must be represented by a guardian **ad litem,** who may be an attorney or other impartial advocate.

2. The court must consider independent evidence based upon a comprehensive medical, psychological and social evaluation of the individual, especially considering the probable impact of pregnancy.

To obtain an order authorizing the sterilization, the petitioning party must convince the court that:

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[14] **E.g., Hudson v. Hudson** (Ala. 1981), 373 So.2d 310; **In re Tulley** (1978), 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 **cert. denied** 440 U.S. 967 (1979); **In re M.K.R.** (Mo. 1974), 515 S.W. 2d 467; **Ruby v. Massey** (D. Conn. 1978), 452 F. Supp. 361.

[15] **E.g., In re C.D.M.** (Alaska 1981), 627 P.2d 607; **In re A.W.** (Colo. 1981), 637 P.2d 366; **In re Grady** (1981) 85 N.J. 235, 426 A.2d 467; **In re Hayes** (1980), 93 Wash. 228, 608 P.2d 635; **In re Eberhardy** (1981), 102 Wis. 2d 539, 307 N.W. 2d 881; **Conservatorship of Valeria N.** (1985), 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387; **Wentzel v. Montgomery General Hospital, Inc.** (1982), 293 Md. 685, 447 A.2d 1244 **cert. den.** 459 U.S. 1147; **Matter of Moe** (1982), 385 Mass. App. 555, 432 N.E.2d 712; **In re Penny N.** (1980), 120 N.H. 269, 414 A.2d 541; **Matter of Sallmaier** (1976), 85 Misc. 2d 295, 378 N.Y.S. 2d 989; **Matter of Terwilliger** (1982), Pa. Super., 450 A.2d 1376.

[16] **See, e.g., In re Grady, supra; In re Hayes, supra.**

1. The individual is incapable of making his or her own decision about sterilization and is unlikely to develop that capacity in the future.

2. The individual is capable of reproduction and likely to engage in sexual activity in the near future.

3. The individual is permanently incapable of caring for a child.

4. All less drastic contraceptive methods are unworkable.

5. The proposed method of sterilization entails the least possible bodily intrusion.[17]

Without specific guidance in the form of a Supreme Court decision or statutory authority, it is difficult to predict how a Montana district court might rule on a request for sterilization. If the court determines it has the power to consider the question, the application of the above-cited standards can provide maximum protection of the privacy rights of the developmentally disabled person involved. Until there is a definitive decision on this issue, the law in Montana regarding these sterilizations will remain unsettled.[18]

V. VOTING RIGHTS

A developmentally disabled person has the right to vote. Under certain circumstances, a court may limit a developmentally disabled person's right to vote, as when a court appoints a full or limited guardian for a person. The limitation on the developmentally disabled person's right to vote must be specifically set forth in the court order appointing the guardian.[19]

A disabled person is entitled to assistance in exercising his or her right to vote, if necessary. This assistance may include bringing a ballot to a person able to come to the premises, but unable to physically enter the polling place. This assistance may also include reading the ballot to a person unable to read. Persons desiring such assistance should request it from the chief election judge at their local polling place.[20]

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[17] **Id.**

[18] It should be noted that federal administrative regulations prohibit the Medicaid program from paying for sterilization of "mentally incompetent" persons. 45 CFR Sec. 441.254.

[19] Sec. 72-5-306, 72-5-316, MCA.

[20] Sec. 13-13-118, 13-13-119, MCA.

CHAPTER SEVEN

INSTITUTIONAL SERVICES

Despite the trend towards de-institutionalization which has occurred over the last ten years, many developmentally disabled persons in Montana still reside in state institutions such as the Montana Developmental Center (MDC — formerly Boulder River School and Hospital), Eastmont Training Center, and Montana State Hospital at Warm Springs. Because of the extreme intrusion on personal liberty which results from institutionalization, there are very specific procedures and protections written into the law to insure that this intrusion is as minimal as possible. These procedures and protections apply from the time of admission to a state institution through the period of residency until the time of release. This chapter outlines these procedures and protections.

I. ADMISSION

The process for admitting a person to a state institution varies depending on the circumstances and the institution.

A. **MONTANA DEVELOPMENTAL CENTER/EASTMONT.** The primary function of these two institutions are the care, treatment, and habilitation of mentally retarded persons.[1] Although Montana has a state policy that these services are to be provided in a community based setting whenever possible,[2] there are some persons for whom no community services are presently available because of their particular mental, medical and behavioral deficits. In the absence of appropriate community services, MDC and Eastmont are two available resources for such persons.

The procedure for admitting a person to one of these institutions is described in Title 53, Chapter 20, Part 1 of the Montana Code Annotated. These statutes set forth the only two ways in which a person can be admitted: 1) emergency commitment and 2) involuntary commitment. There is no such thing as a voluntary admission to either MDC or Eastmont. All admissions to either of these facilities for more than 30 days require court involvement and approval.[3]

1. **Emergency Admission.** If a person believed to be developmentally

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[1] Sec. 53-20-501, MCA.

[2] Sec. 53-20-101(2), MCA.

[3] Sec. 53-20-120(2), 53-20-126(1), MCA.

disabled poses a threat of death or serious bodily harm to himself or others, that person may be admitted to one of these facilities. On the next judicial day, however, the county attorney must file a petition seeking the person's admission for evaluation and treatment, pursuant to the procedures for an involuntary commitment described below. An emergency admission may last only as long as necessary to protect the person and in no case longer than thirty days without court approval.[4]

2. **Involuntary Admission.** Anyone who believes a developmentally disabled person is in need of the services provided at an institution may report the situation to a professional person, who is either a physician or is certified by the Departments of Institutions and SRS.[5] The professional is then required to contact the developmentally disabled person's parents or guardians. If the professional believes the person is in need of institutional services, she or he shall ask the county attorney to file a petition with the district court describing the situation. This petition must contain a statement of the rights of the person alleged to be developmentally disabled.[6]

Throughout the procedures involved after the filing of this petition, the person believed to be developmentally disabled has certain specific rights, including:

a) the right to notice of any hearing;

b) the right to be present, to offer evidence, and to present witnesses;

c) the right to be represented by a private lawyer or a lawyer appointed by the court;

d) the right to remain silent;

e) the right to view and copy all papers filed with the court;

f) the right to be examined by a professional person of his or her choice;

g) the right to be dressed in his or her own clothes at any hearing; and

h) the right to refuse any but life-saving medication up to 24 hours prior to any hearing.[7]

After the filing of a petition for involuntary admission, the procedures are quite detailed. In summary, they call for evaluation of the person by a professional person who makes his or her recommendation to the court as to an appropriate course of action and an opportunity for hearing on the matter. If the court decides the person needs further evaluation and treatment, it must order such services to be provided in the least restrictive

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[4] Sec. 53-20-129, MCA.

[5] Sec. 53-20-102(7), MCA.

[6] Sec. 53-20-121, MCA.

[7] Sec. 53-20-112, MCA, **incorporating** Sec. 53-21-115, MCA.

environment. Only if such evaluation and treatment cannot be done in a community based facility may the person be committed to a residential institution such as MDC or Eastmont. This evaluation period may not last for more than 30 days.[8]

Upon the completion of this initial evaluation and treatment, the professional person in charge of the case must recommend either discontinuation of institutional services, community based services, or commitment to a residential facility only if the person is seriously developmentally disabled and no appropriate community based services exist. Again, there is an opportunity for court hearing on this recommendation.[9] If the Court concludes that admission to a residential facility is necessary, it may order such commitment for not more than one year.[10]

3. **Voluntary Request for Services.** Although there is no such thing as a voluntary admission to MDC or Eastmont, it is permissible for the parents or guardians of a developmentally disabled person to request assistance from a professional as to the appropriate course of treatment. Based on this request, the professional person may, if no appropriate community-based facility is available, recommend evaluation and treatment in an institutional facility. Such residential evaluation and treatment may not last for more than thirty days without court approval.[11]

B. **MONTANA STATE HOSPITAL, WARM SPRINGS CAMPUS.** Some of Montana's developmentally disabled persons reside at Montana State Hospital at Warm Springs. The admission/commitment procedures for this institution are very similar to those for admission to MDC or Eastmont. These procedures are found in Title 53, Chapter 21, Part 1, **et seq.,** MCA.

In one crucial respect, however, the admission procedure for Montana State Hospital is different than for the other two facilities. It is possible to admit oneself voluntarily to the Montana State Hospital. This admission must be truly voluntary and must be approved by a professional person. A person admitted voluntarily enjoys the same rights while in Montana State Hospital as involuntarily committed persons.[12]

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[8] Sec. 53-20-123, MCA.

[9] Sec. 53-20-124 through 125, MCA.

[10] Sec. 53-20-125 through 126, MCA.

[11] Sec. 53-20-120, MCA.

[12] Sec. 53-21-111, MCA.

II. RIGHTS IN THE INSTITUTION

A. **MONTANA DEVELOPMENTAL CENTER/EASTMONT.** While in MDC or Eastmont, residents have the following rights:

1. The right to dignity, privacy and humane care.

2. The right to send and receive sealed mail.

3. The right to private telephone communications, unless restricted by the written order of a professional person responsible for the resident's habilitation plan.

4. The right to visitation unless restricted by the written order of a professional person responsible for the resident's habilitation plan.

5. The right to suitable educational and habilitation services.

6. The right to an adequate allowance of neat, clean and seasonable clothing.

7. The right to keep and use his or her own personal possessions unless determined to be dangerous to the resident or others.

8. The right to a humane physical environment including clean, attractive and safe facilities.

9. The right to prompt and adequate medical treatment for any physical or mental ailments or injuries.

10. The right to be free from corporal punishment.

11. The right to an opportunity to engage in voluntary religious worship.

12. The right to a nourishing, well-balanced diet.

13. The right to regular physical exercise.

14. The right, with appropriate supervision, to interaction with members of the opposite sex, unless restricted by the written order of the professional person responsible for the resident's habilitation plan.[13]

Montana statutes also provide that residents shall not be subjected to unnecessary or excessive medication,[14] nor shall they be subjected to any unusual or hazardous treatment procedures.[15] Any proposed treatment procedures must be reviewed and approved by the Mental Disabilities Board of Visitors[16] prior to implementation.

Physical restraint may be used only when necessary to protect a resident from injury or to prevent injury to others, and may be used only when

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[13] Sec. 53-20-142, MCA.

[14] Sec. 53-20-145, MCA.

[15] Sec. 53-20-146, MCA.

[16] Sec. 53-20-146(1), MCA. The Mental Disabilities Board of Visitors is composed Of five citizens who are appointed by the Governor. Sec. 2-15-211, MCA.

authorized in writing by a professional person.[17] All behavior modification programs which use noxious or aversive stimuli as negative reinforcement must be reviewed and approved by the Board of Visitors and may be conducted only with the express and informed consent of the resident, if able to give consent, and his or her parents, guardian, or responsible person.[18]

Residents may not be used as subjects for experimental research without the express and informed consent of the resident, if able to give consent, and his or her parents, guardian, or responsible person. Any proposed experimental research involving human subjects must be reviewed and approved by the Board of Visitors before such consent may be sought.[19]

B. **MONTANA STATE HOSPITAL, WARM SPRINGS CAMPUS.** Residents at Montana State Hospital enjoy similar rights as those listed above. Please see sections 53-21-141 through 148, MCA, for further information on how these rights may vary.

III. HABILITATION

A. **MONTANA DEVELOPMENTAL CENTER/EASTMONT.** All persons admitted to these residential institutions have a right to treatment and habilitation to develop and realize their own fullest potential.[20] Treatment and habilitation must be provided through the least restrictive means possible.

Every resident must be evaluated and shall have an individualized treatment plan (ITP) developed for him or her within 30 days after the resident's admission to the facility. The plan shall describe the limitations and needs of the resident; the intermediate and long range goals for the resident with a projected timetable for attainment of these goals; a statement of how these goals shall be achieved; a listing of the staff responsible for assisting the resident in reaching each goal; criteria for discharge; and a projected date for discharge.[21]

Habilitation plans must be reviewed monthly and may be modified if necessary. Six months after admission, and annually thereafter, the resident

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[17] Sec. 53-20-146(2), MCA.

[18] Sec. 53-20-146(4), MCA. A responsible person is any person appointed by the district court to protect the rights of the person who is developmentally disabled or alleged to be developmentally disabled. Sec. 53-20-114, MCA.

[19] Sec. 53-20-147, MCA.

[20] Sec. 53-20-102(5), MCA.

[21] Sec. 53-20-148, MCA.

shall be re-evaluated and shall receive a comprehensive psychological, habilitative, social and medical diagnosis. The plan shall be reviewed within six months of admission and annually thereafter by an interdisciplinary team to assure its appropriateness and shall be modified as necessary.[22]

The facility must report in writing to the parents or guardian of the resident at least every six months on the resident's habilitation and medical condition.[23]

B. **MONTANA STATE HOSPITAL, WARM SPRINGS CAMPUS.** Residents at Montana State Hospital have a right to an individualized treatment plan similar to the habilitation plan described above. See Section 53-21-162, MCA, for more information about this plan.

IV. DISCHARGE

A. **MONTANA DEVELOPMENTAL CENTER/EASTMONT.** With Montana's policy of serving developmentally disabled persons in the community whenever possible, long-term residence in a residential institution is not favored. Underlying any residential institutional placement is the idea that such placement will end when there exists an appropriate community based alternative to which the person may be discharged.[24]

In furtherance of that goal, as part of any active treatment plan there is to be a post-institutionalization plan identifying the community services necessary to allow the resident to be placed in the community.[25] When these services become available, the professional persons in charge of the case may release the person to the community based alternative, upon fifteen days notice to the person, his parents or guardian, attorney, and the court. If any of these persons objects to this release, she or he may request a hearing on the proposed release.[26]

Alternatively, if any of these persons independently locates a suitable community placement, she or he may request the professional person to release the person to such placement. If the professional refuses to release the resident, the person seeking the release may request a hearing to determine whether the release is appropriate.[27]

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[22] Sec. 53-20-148(7), MCA.

[23] Sec. 53-20-148(9), MCA.

[24] Sec. 53-20-101 through 127, MCA.

[25] Sec. 53-20-148(5), MCA.

[26] Sec. 53-20-127, MCA.

[27] Sec. 53-20-127(2), MCA.

B. **MONTANA STATE HOSPITAL, WARM SPRINGS CAMPUS.** The procedures for discharge from the Montana State Hospital are similar to those for MDC and Eastmont.[28] A person voluntarily admitted may request his or her release but the facility may detain him or her for not more than five days beyond the request. During this time, the facility may seek court authorization to detain the person longer, in effect changing the voluntary admission to an involuntary one.[29]

Upon discharge from any of Montana's residential institutions, a person is restored to his or her full civil rights unless the terms of the discharge impose some limitation on these rights.[30]

V. ENFORCEMENT

The foregoing discussion is only a summary of some of the most detailed statutes in Montana's Code. These statutes are written to provide due process of law to anyone committed to or residing in one of Montana's institutions.[31]

In order to insure that these procedural rights are followed, the State has created a Mental Disabilities Board of Visitors, charged with overseeing these institutions. Questions concerning any issue involving admission to or placement in an institution may be directed to:

Mental Disabilities Board of Visitors
Office of the Governor
Capitol Station
Helena, MT 59620
(406) 444-3955

Kathy McGowan
Office of the Governor
Capitol Station
Helena, MT 59620
(406) 444-3468 or
1-800-332-2272

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[28] Sec. 53-21-181, **et seq.**, MCA.

[29] Sec. 53-21-111, MCA.

[30] **See, Zion v. Xanthopoulos** (1978), 178 Mont. 468, 585 P.2d 1084.

[31] Sec. 53-20-101(4), 53-21-101(4), MCA.

CHAPTER EIGHT

SOCIAL SECURITY

I. INTRODUCTION

The Social Security Administration (SSA) provides benefits to a variety of people under a variety of different programs. The regulations for these programs are extremely detailed and complex. For this reason, this Chapter can give only a very general description of those programs in which developmentally disabled persons are most likely to participate.

A. **SOCIAL SECURITY DISABILITY INSURANCE (SSDI).**[1] This program provides cash payments to eligible disabled workers; to the minor dependents and spouses of disabled, retired or deceased workers; and to certain disabled adult dependents of disabled, retired or deceased workers.

B. **SUPPLEMENTAL SECURITY INCOME (SSI).**[2] This program provides cash payments to elderly people and disabled children or adults who have limited income and assets.

It is possible for a person to receive benefits from both the SSDI and SSI programs. The benefits from the SSI program will be reduced, however, to compensate for the benefits received from the SSDI program.[3]

II. PROGRAM BENEFITS

A. **SOCIAL SECURITY DISABILITY INSURANCE.** Monthly cash benefits are paid to eligible persons. Some SSDI recipients may be eligible also for the Medicare program which pays for certain medical expenses.

B. **SUPPLEMENTAL SECURITY INCOME.** Monthly cash benefits are paid to eligible persons. In addition, the State of Montana supplements the SSI payments for certain categories of recipients. See Chapter Two on Community Services, State Supplement.

All SSI recipients are eligible for food stamps upon completing the separate application process for food stamps at the human services office.

Most SSI recipients are also eligible for medical assistance under the Medicaid program, which pays for a broad range of medical services. See Chapter Two on Community Services, Medical Care.

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[1] 42 USC Sec. 401, **et seq.**; 20 CFR Part 404.

[2] 42 USC Sec. 1381, **et seq.**; 20 CFR Part 416.

[3] 20 CFR Sec. 416.1121.

C. **REPRESENTATIVE PAYEE.**[4] SSI and Social Security Disability checks are mailed directly to the recipients unless it appears that the recipient is incapable of managing his or her monthly payments. In such cases, the SSA may make payments to a "representative payee" for and on behalf of the recipient.

The "representative payee" is selected by the Social Security Administration. Appointment as a representative payee is not the same as a judicial appointment of a guardian or conservator. The representative payee's authority is limited to receiving the monthly SSDI or SSI check on behalf of the recipient and applying those funds toward the recipient's current needs, such as rent, food and clothing.

The person acting as representative payee may be changed if it is shown that he or she is not performing his or her duties in the best interest of the recipient. If the recipient becomes able to adequately manage his or her monthly payments, the representative payee may be discharged upon the approval of the SSA.

III. ELIGIBILITY

A. **DETERMINATION OF DISABILITY.**[5] To be eligible for disability benefits under either the SSDI or SSI program, a person must show that because of his or her disability, she or he is unable to engage in substantial gainful employment. Disability is defined as a physical or mental impairment which is likely to last for 12 months or more.

A person meets the above disability requirement only if the impairments are such that she or he cannot engage in **any** kind of work which might exist in the national economy regardless of whether such works exists in the immediate area in which she or he lives, whether a job is available, or whether she or he would be hired if she or he applied.

A child under the age of 18 will be considered disabled if his or her physical or mental impairment compares in severity to an impairment that would make an adult disabled.[6]

B. **OTHER REQUIREMENTS — SSDI.** A worker may be eligible for SSDI benefits if she or he becomes disabled and has worked in jobs which paid into the Social Security System for the required length of time. The dependents of eligible disabled workers can also receive benefits.

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[4] 20 CFR Sec. 404.2001, **et seq.**; 20 CFR Sec. 416.601, **et seq.**

[5] 42 USC Sec. 423; 20 CFR Sec. 404.1501, **et seq.**; 20 CFR 416.901, **et seq.**

[6] 20 CFR Sec. 404.1511; 20 CFR Sec. 416.906

Unmarried children under age 18 and unmarried disabled children who became disabled before age 22 are considered dependents for purposes of SSDI eligibility. Financial need is not a factor in determining eligibility for Social Security disability benefits.

C. **OTHER REQUIREMENTS — SSI.** Disabled persons of any age and people over 65 who have limited incomes and resources may be eligible for SSI. Financial eligibility is determined by a process which considers the income and resources of the applicant and members of the applicant's household. Some income and resources (such as a family home) are disregarded for the purpose of SSI eligibility.

IV. APPLICATION AND APPEAL PROCESS

A. **INITIAL APPLICATION.** Persons may apply for both SSDI and SSI benefits by contacting their local Social Security office. Applicants should provide information regarding age, disability (medical reports and records), and income and resources if applying for SSI. The applicants will receive written notice from the Social Security Administration either granting or denying the benefits.

B. **RECONSIDERATION.**[7] If the application is denied, the applicant may request a reconsideration of his or her application by submitting a Request for Reconsideration within 60 days after notice of denial has been received. Request for Reconsideration forms are available at the Social Security office.

The Social Security Administration will rarely overturn its original denial of the application upon reconsideration. Regardless of the outcome, the SSA is required to provide written notice of its decision to the applicant.

C. **HEARING BEFORE ADMINISTRATIVE LAW JUDGE.**[8] If the applicant is again denied benefits after reconsideration, the applicant may request a hearing before an Administrative Law Judge within 60 days of receiving the notice of the reconsideration decision.

The applicant may request a hearing on the form available at the Social Security office. At the hearing, the applicant may be represented by an attorney or any other person he or she chooses, and may present testimony of witnesses and other evidence to establish that she or he is eligible for disability benefits.

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[7] 20 CFR Sec. 404.907, **et seq.**; 20 CFR Sec. 416.1407, **et seq.**

[8] 20 CFR Sec. 404.929, **et seq.**; 20 CFR Sec. 416.1429.

D. **APPEALS COUNCIL REVIEW.**[9] If the applicant is dissatisfied with the decision of the Administrative Law Judge, she or he may seek a review of the decision by the Social Security Administration Appeals Council in Washington, D.C., by submitting a request for review.

The Appeals Council review consists of a review of the existing record of the case and any other additional information which may be offered. If the applicant is dissatisfied with the decision of the Appeals Council, she or he may ask the federal district court to review the decision by filing a formal written complaint in the United States District Court.[10]

[9] 20 CFR Sec. 404.967; 20 CFR Sec. 916.1467, **et seq.**

[10] 42 USC Sec. 405; 42 USC Sec. 1383.

SPECIAL EDUCATION

I. FREE APPROPRIATE PUBLIC EDUCATION

Both federal[1] and state[2] law guarantee a "free and appropriate public education" for all handicapped children between the ages of 6 and 18 inclusive.[3] By September 1, 1990, handicapped preschool children between the ages of 3 and 6 will be eligible for services.[4] In some cases, children between 19 and 21 may also be eligible.

A free appropriate public education is defined as including "special education and related services."[5] "Special education" is defined in part as "specifically designed instruction . . . to meet the unique needs of a handicapped child."[6] "Related services" are defined as including "transportation and such developmental, corrective and other supportive services

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[1] The primary federal statutes dealing with education of handicapped students are 20 USC Sec. 1401-1461, with implementing regulations found at 34 CFR Part 300. This is a funding statute; states that agree to provide a free appropriate public education are eligible to receive federal financial assistance in meeting this goal. 20 USC Sec. 1412. A second relevant federal statute is section 504 of the Rehabilitation Act of 1973. 29 USC Sec. 794; 34 CFR Sec. 104.31 — 104.39. This is an anti-discrimination statute applicable to all educational institutions receiving federal financial assistance. 34 CFR Sec. 104.31. Such recipients must provide a free appropriate public education to each qualified handicapped person, regardless of the nature or severity of the person's handicap. 34 CFR Sec. 104.33. The U.S. Supreme Court has held, however, that Section 504 is inapplicable when relief is available under the Education of the Handicapped Act. **Smith v. Robinson** (1984), 104 S.Ct. 3457, 82 L.Ed.2d 746. A more pragmatic aspect of the **Robinson** decision was to deny parents their attorney fees in special education proceedings. Congress reversed this latter holding in 1986. **See,** 20 USC 1415(e)(4).

[2] Title 20, Chapter 7, Part 4, MCA; regulations found at Title 10, Chapter 16, ARM. Like the federal government, Montana also has anti-discrimination statutes prohibiting discrimination against handicapped persons in education. Sec. 49-2-307, 49-3-203, MCA, although these state statutes do not specifically refer to a requirement of providing a free appropriate public education. It should also be noted that the federal requirements are supreme and that, in case of conflict, the federal requirements must be followed. **Matter of "A" Family** (1979), 184 Mont. 145, 602 P.2d 157, 166.

[3] Sec. 20-7-411(2), MCA.

[4] Sec. 20-7-411(3), MCA.

[5] 20 USC Sec. 1401(18).

[6] 20 USC Sec. 1401(16).

. . . as may be required to assist a handicapped child to benefit from special education.''[7]

The term ''free and appropriate public education'' has become a catch phrase in special education, an abbreviated reference to all the educational and related services which go into making up such an education. Yet it retains a specific statutory definition which places emphasis on all the words in the phrase.

Thus, the education must be ''free,'' that is, provided at public expense, with no cost to parents or guardians.[8] It must be ''public,'' that is, to the maximum extent appropriate, the education must take place in the regular classroom with non-handicapped children.[9] The services to be provided must be designed as an ''education,'' that is, they should be ''reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.''[10]

While disputes have arisen over each of these aspects of a free appropriate public education,[11] by far the most difficult aspect of this requirement is what comprises an ''appropriate'' education.

Before proceeding with a discussion of this concept, it is helpful to identify what is not included within this requirement. The requirement is only to provide an ''appropriate'' education, not necessarily the ''best'' possible education.[12] Nor does the requirement that the education be ''appropriate'' carry with it a guarantee that the education be ''successful.'' In fact, the federal regulations specifically relieve any agency or teacher of accountability should a student not achieve the goals set forth in a properly drawn education program.[13]

The law does require, however, adherence to a particular procedure for determining what is an ''appropriate'' public education for a particular

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[7] 20 USC Sec. 1401(17). Related services can be quite broad. In Montana, psychotherapy has been defined as a related service. **Matter of ''A'' Family** (1979), 184 Mont. 145, 602 P.2d 157. The U.S. Supreme Court has declared intermittent catheterization as a related service. **Irving Independent School District v. Tatro,** (1984), 104 S.Ct. 3371, 82 L.Ed.2d 664.

[8] 20 USC Sec. 1401(16).

[9] Sec. 20-7-411(1), MCA.

[10] **Board of Education v. Rowley** (1982), 102 S.Ct. 3034, 3049.

[11] For example, MAP has been involved in several cases in which transportation has been the issue. In these cases, whether the transportation arrangement is ''free'' or not has been the question.

[12] **Board of Education v. Rowley** (1982) 102 S.Ct. 3034, 3048; **Buchholtz v. Iowa Department of Instruction** (1982), Iowa, 315 N.W. 2d 789, 793.

[13] 34 CFR Sec. 300.349.

handicapped student. By adherence to this procedure, each student's needs should be properly identified and an appropriate education plan should be developed to meet those needs. This procedure requires cooperation and consensus between parents and school to achieve and implement an appropriate education for a handicapped child.

II. CHILD STUDY TEAM/INDIVIDUALIZED EDUCATION PROGRAM

The procedure required by the federal and state laws for developing an appropriate education plan for an individual student is simple and straightforward and may be briefly outlined as follows.

A. **REFERRAL.** To become involved in the special education system, a student must first be referred for evaluation. Although this referral may be made by a parent or guardian, the regulatory burden falls on the school district to annually screen and refer potential candidates for evaluation. These referrals may be made for any students who are experiencing academic difficulties or who are otherwise in apparent need of special education services.[14]

B. **CHILD STUDY TEAM EVALUATION.** Typically, the next step in the process is the convening of a "child study team."[15] A basic child study team includes the parents, a regular classroom teacher, the school principal, and a special education teacher. Depending on the circumstances, other persons, such as school psychologists, speech pathologists, and advocates may participate as child study team members.[16] The first function of the child study team is to evaluate the information about the child to identify his or her handicaps.[17] Throughout this process the child study team operates on consensus; should there be a dispute over a child's disabilities, either the parents or the school may request an independent evaluation.[18]

C. **INDIVIDUALIZED EDUCATION PROGRAM.** Having identified

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[14] Sec. 10.16.1201, ARM.

[15] Sec. 10.16.1202, ARM. This is typical next step. It is not uncommon, however, for the student to first be evaluated by outside experts, such as psychologists, physicians, etc., whose evaluation reports are then considered by the child study team along with other available information.

[16] Sec. 10.16.1204, 10.16.1205, ARM.

[17] Sec. 10.16.1202, 10.16.1203, ARM.

[18] Sec. 10.16.1102, 10.16.1203(7), ARM.

the student's disabilities, the child study team next proceeds to development of an Individualized Education Program (IEP). It is the IEP which defines the "appropriate" education for each handicapped student. The IEP must include a statement of the present levels of educational performance for the child, a statement of annual goals, a list of short term instructional objectives, a statement of the specific educational services to be provided to the child and the extent to which he or she will be able to participate in regular education programs, the dates for initiation and completion of these services, and appropriate criteria for determining whether the instructional objectives are being met.[19] While the school is not required to guarantee success, it is required to provide services as outlined in the IEP.

D. **ANNUAL REVIEW.** After the implementation of the services called for in the IEP, the child study team is required to review, not less than annually, the IEP and make appropriate revisions.[20] Of course, should some questions arise over the continued appropriateness of the IEP, a child study team may be convened at any time to examine the situation.

The foregoing is the basic procedure applicable to all special education students. Parental participation and approval is an indispensable part of this process. Parents must give written consent to any evaluation,[21] to the initial placement, to the IEP itself,[22] and to any change in their child's educational placement.[23] The entire process is based on the child study team being able to reach consensus on all decisions.

III. DUE PROCESS

Should the child study team not be able to reach this consensus, the law provides for a further procedure to resolve any conflicts. This procedure is commonly referred to as "due process." This purpose of the due process hearing is to allow both parents and school the opportunity to present their views to an impartial hearing officer who then decides which side is to prevail. In Montana, the due process proceeding consists of a multi-leveled series of hearings and appeals described below.[24]

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[19] Sec. 10.16.1207, ARM.

[20] Sec. 10.16.1209, ARM.

[21] Sec. 10.16.902, ARM.

[22] Sec. 10.16.1207, ARM.

[23] Sec. 10.16.904, ARM.

[24] One potential disadvantage of the extensive appeal process has been that the child would be required to remain in what may have been an inappropriate placement during the appeal, unless the parties agree otherwise. 20 USC Sec. 1415(e)(3);

A. **STATE SUPERINTENDENT OF PUBLIC INSTRUCTION.** An impartial due process hearing is initiated by a written request to the State Superintendent of Public Instruction, State Capitol, Helena, Montana 59620. The request must include a statement identifying the parties, setting forth the matter asserted, and referring to the statutes or rules affected.[25]

Upon receipt of the request for hearing, the State Superintendent is to give the local school district ten days to try to resolve the controversy. While this time is going on, the State Superintendent gives each side the names of five proposed hearings officers. Each side may cross off two names and rank the remaining three names. From this information, the State Superintendent appoints the hearing officer.[26]

B. **IMPARTIAL HEARING OFFICER.** Upon appointment, the hearing officer then holds a full hearing on the matter, receiving testimony and exhibits from both sides.[27] This hearing, although often informal in setting, is the substantive hearing in the case, when both sides are given their primary opportunity to present evidence. Based on this hearing, the hearing officer issues a formal order.[28] The decision must be made within 45 days of receipt of the notice of appeal.[29]

C. **STATE OR FEDERAL COURT.** Either party may appeal the decision of the hearing officer to either federal or state district court.[30]

SUMMARY

The foregoing is intended as a general description of the concepts and procedures applicable to special education. Because of the requirement that these cases be approached on an individual basis, it is impossible to cover every possible problem. As noted earlier, adherence to these procedures should produce an appropriate education program for each of Montana's handicapped children.

Sec. 10.16.904, ARM. In a recent decision, however, the U.S. Supreme Court held that school districts may be required to reimburse parents if the parents unilaterally move the child to what the parents consider to be an appropriate educational placement. Reimbursement is available if the due process proceedings demonstrate the parents were correct in their assessment. **Burlington School Committee v. Department of Education** (1985), 105 S.Ct. 1996, 85 L.Ed.2d 385. This is being hailed as a very "pro-parent" decision.

[25] Sec. 10.6.103(4), ARM.

[26] Proposed Rule I, Montana Admin. Reg., 1987 Issue No. 24, p. 2333.

[27] Sec. 10.6.106 through 10.6.118, ARM.

[28] Sec. 10.6.119, ARM.

[29] Proposed Rule III, Mont. Admin. Reg., 1987 Issue No. 24, p. 2336.

[30] 20 USC Sec. 1415(e).

ZONING

The community group homes funded by the State to provide lodging for developmentally disabled persons are, by their very nature, located in the residential areas of Montana's cities and towns. This has raised the question of whether zoning or other controls may prohibit the establishment of such group homes in these residential areas.

The Montana Legislature has answered this question by declaring that community group homes are a permitted use in all residential zones, including those areas zoned for single-family dwellings.[1] The Montana Supreme Court has upheld this statute, thereby conclusively establishing that group homes may be located in residential areas.[2]

Restrictive covenants, which are landowner agreements on the use of land in a particular area, may not be used to bar group homes.[3]

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[1] Sec. 76-2-314(2), MCA.

[2] **State ex rel. Thelen v. City of Missoula** (1975), 168 Mont. 375, 643 P.2d 173; **see also, City of Cleburne v. Cleburne Living Center** (1985), 105 S.Ct. 3249.

[3] **State ex rel. Region II Child and Family Services v. District Court** (1980), Mont., 609 P.2d 245.

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